No. 17-1091

In the Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,
Petitioners,

v.

STATE OF INDIANA,
Respondent.

On Writ Of Certiorari
To The Indiana Supreme Court

BRIEF OF DRUG POLICY ALLIANCE, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AMERICANS FOR PROSPERITY, THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, FREEDOMWORKS FOUNDATION, THE LAW ENFORCEMENT ACTION PARTNERSHIP, AND OTHERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the Drug Policy Alliance, the National Association for the Advancement of Colored People, Americans for Prosperity, the Brennan Center for Justice at NYU School of Law, FreedomWorks Foundation, the Law Enforcement Action Partnership, the Independence Institute, Libertas Institute, the Drug Policy Forum of Hawai'i, the Colorado Criminal Defense Bar, Alabama Appleseed Center for Law and Justice, and the Rio Grande Foundation. Although they have diverse missions and perspectives, *amici* share a commitment to improve the welfare of all Americans by curbing governmental abuse of asset forfeiture laws. *Amici* believe that the modern experience with asset forfeiture counsels in favor of holding that the Eighth Amendment's Excessive Fines Clause is incorporated and applies to the states.

SUMMARY OF THE ARGUMENT

Although history drives much of the modern incorporation analysis, the contemporary importance of a right protected by one of the first eight amendments to the Constitution is also significant in evaluating whether the right is incorporated against the states.

The modern experience with civil asset forfeiture provides a stark example of the abuse of power the Excessive Fines Clause was meant to curtail, and that

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[1] All parties have filed blanket consents to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no person other than *Amici*'s counsel made a monetary contribution to fund the preparation or submission of this brief.

abuse demonstrates why the right should be incorporated through the Fourteenth Amendment.

Congress expanded the federal asset-forfeiture regime in the 1970s in an effort to cripple drug-trafficking organizations and their kingpins, and the federal experiment led the states to adopt their own follow-on statutes. These days, however, states do not seize the assets of drug kingpins (if they ever did), but of ordinary Americans, often with little or no connection to criminal activity. And, because the proceeds of a forfeiture proceeding often go to the enforcement agency itself, state agencies employ these proceedings as a mechanism for funding their operations — with assets seized predominantly from the poor and people of color.

Worse, asset-forfeiture proceedings often do not afford the procedural protections deemed essential in the criminal-law enforcement context. States take money and property from Americans in civil proceedings without charging (let alone convicting) them of any crime, and without providing any of the other protections that usually attend criminal proceedings.

This Court has already held that forfeitures can be "fines" under the Eighth Amendment. It should now hold the Excessive Fines Clause is incorporated against the states. Doing so will better safeguard the rights of all Americans against this troubling abuse of governmental power — whatever its source.

ARGUMENT

I. The Incorporation Inquiry Considers The Importance Of A Right And Its Function In Contemporary Society.

The question before the Court is whether the "Framers and ratifiers of the Fourteenth Amendment counted the right" contained in the Excessive Fines Clause "among those fundamental rights necessary to our system of ordered liberty." *McDonald* v. *City of Chicago*, 561 U.S. 742, 778 (2010).

In addressing that question, the original understanding is of course significant, but the "inquiry must focus upon the function served" by the right in "contemporary society." *Apodaca* v. *Oregon*, 406 U.S. 404, 410 (1972) (plurality opinion); see also *Duncan* v. *Louisiana*, 391 U.S. 145, 154 (1968) (noting that the right to a jury in criminal trials "continues to receive strong support"); *Klopfer* v. *North Carolina*, 386 U.S. 213, 226 (1967) (noting the prominence of the right to a speedy trial "today").

Indeed, "the Court has either explicitly or implicitly made clear in its [incorporation] opinions that the right in question [must] ha[ve] remained fundamental *over time*" in order to be deemed incorporated. *McDonald*, 561 U.S. at 917–18 (Breyer, J., dissenting) (emphasis added); see also *id.* at 787 (opinion of Alito, J.) (recognizing the "present day implications" of parties' arguments and rejecting the argument that the "scope of the Second Amendment right is defined by the immediate threat that led to the inclusion of that right in the Bill of Rights"); *id.* at 873 (Stevens, J., dissenting) ("[S]ubstantive due process analysis — from which . . . 'incorporation'

analysis derives — must not be wholly backward looking.").

Petitioner ably explains why the original understanding favors incorporation of the Excessive Fines Clause. *Amici* respectfully submit that the modern experience with civil asset forfeiture provides additional, strong support for incorporation.

II. The Modern Experience With Asset Forfeiture Demonstrates Why The Excessive Fines Clause Should Be Held To Be Incorporated.

A. Congress Significantly Altered And Expanded The Forfeiture Landscape Starting In The 1970s And 1980s.

Asset forfeiture had "humble beginnings in maritime law." Rachel L. Stuteville, *Reverse Robin Hood: The Tale of How Texas Law Enforcement Has Used Civil Asset Forfeiture To Take From Property Owners and Pad the Pockets of Local Government—The Righteous Hunt for Reform Is On*, 46 Tex. Tech L. Rev. 1169, 1174 (2014). But it was little used until the "War on Drugs."

Starting in the 1970s and continuing through the 1980s, the Government came to believe that asset forfeiture could be a powerful tool in its efforts to curtail drug trafficking. For example, a 1981 report from the Government Accountability Office to the Chair of the Senate Criminal Justice Subcommittee stated that forfeiture was not being used to its full potential to take "the profit out" of the drug trade, and recommended that forfeiture be an "additional dimension in the war on drugs." Milton J. Socolar, Comptroller General, *Asset Forfeiture — A Seldom Used Tool In Combatting Drug Trafficking* (1981),

https://bit.ly/2Npcmm3. The Department of Justice articulated the similar view that forfeiture could be used to confront the "high echelon criminal elements who are isolated from the distribution of drugs but who direct, control, and profit from the drug traffic." U.S. Department of Justice, Drug Abuse Policy Office, and Office of Policy Development, *National Strategy for Prevention of Drug Abuse and Drug Trafficking* 51 (Sept. 1984) ("DOJ National Strategy"), https://bit.ly/2NQ9USu.

Consistent with these objectives, over time Congress significantly broadened the categories of assets state and federal officers could seize. Thus, in 1970, Congress enacted two statutes permitting the seizure of controlled substances, raw materials, and any equipment involved in their production and distribution. Organized Crime Control Act, Pub. L. No. 91–452, 84 Stat. 922 (1970); Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91–513, 84 Stat. 1236 (1970). In 1978, Congress allowed for the forfeiture of money and other objects of value furnished or intended to be furnished "in exchange for a controlled substance" and "all proceeds traceable to such an exchange." Psychotropic Substances Act, Pub. L. No. 95–633, 92 Stat. 3768. Then, in 1984, it allowed for the forfeiture of real property connected to a drug crime. Comprehensive Crime Control Act, Pub. L. No. 98–473, 98 Stat. 1837 (1984); see also S. Rep. No. 225, 98th Cong., 1st Sess. (1983) ("In recent years the Justice Department and other federal agencies have made a concerted effort to increase the use of forfeiture in narcotics and racketeering cases," and that the 1984 statute was "intended to eliminate the statutory limitations and ambiguities that have

frustrated active pursuit of forfeiture by federal law enforcement agencies.").

By the mid-1980s, having expanded the federal forfeiture laws to reach all species of property connected to drug offenses, Congress began to enlarge federal law to enable enforcement agencies to target the proceeds of many other crimes as well. Congress permitted forfeiture of money laundering proceeds in 1986, Anti-Drug Abuse Act of 1986, Pub. L. No. 99–570, 100 Stat. 3207; proceeds from the unlawful receipt of loan commissions, embezzlement by bank employees, and bank fraud in 1989, Financial Institution Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101–73, 103 Stat. 504; and proceeds from mail fraud, wire fraud, altering motor vehicle identification numbers, armed robbery of automobiles, and transporting stolen motor vehicles in the early 1990s, Crime Control Act of 1990, Pub. L. No. 101–647, 104 Stat. 4874 (1990); Anti Car Theft Act of 1994, Pub. L. No. 102–519, 106 Stat. 3384 (1992). The federal civil forfeiture statute, first enacted in 1986, now reaches the proceeds of a wide array of crimes, as well as conspiracy to commit them. See 18 U.S.C. § 981.

The War on Drugs led Congress to alter the forfeiture landscape along another dimension as well. In 1984, in an effort to incentivize enforcement agencies to reduce the profits from the drug trade, Congress began to permit the agencies to retain forfeited assets. Specifically, Congress enacted two key amendments. First, while all assets seized through forfeiture proceedings under the prior regime had been deposited into the general fund of the U.S. Treasury, the Act created a new "Department of Justice Assets Forfeiture Fund," into which seized

assets were deposited. See Comprehensive Crime Control Act, Pub. L. No. 98–473, 98 Stat. 1837, 2051 (removing reference to the "general fund of the United States Treasury" and establishing a "special fund to be known as the Department of Justice Assets Forfeiture Fund"). The Fund's assets could be used for future enforcement activities, and the Fund was intended to be "self-sustaining." *Id.*; Annemarie Bridy, *Carpe Omnia: Civil Forfeiture in the War on Drugs and the War on Piracy*, 46 Ariz. St. L.J. 683, 695 (2014).

Second, in an effort to encourage cooperation from state and local law-enforcement partners in the War on Drugs, the Comprehensive Crime Control Act of 1984 provided the Attorney General authority to transfer to state or local law-enforcement agencies a share of forfeiture proceeds, through a program referred to as "Equitable Sharing." See Pub. L. No. 98–473, § 309, 98 Stat. 1837, 2051 (referring to the "equitable transfer" of forfeited property to state or local law enforcement); Office of the Inspector General, U.S. Department of Justice, *Review of the Department's Oversight of Cash Seizure and Forfeiture Activities* 7–8 (March 2017) ("DOJ Review"), https://bit.ly/2oxYt4S. As implemented by the Attorney General, the Equitable Sharing program allows state and local law enforcement to receive up to eighty percent of forfeiture proceeds. DOJ Review, *supra*, at 7–8.[2]

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[2] *Id.* at 1, 8 (noting that the DOJ has provided over $6 billion to state and local enforcement through the equitable sharing program in fiscal years 2000 to 2016); U.S. Department of Justice, *Guide to Equitable Sharing for State, Local, and Tribal Law Enforcement*

B. States Adopted Forfeiture Laws Modeled On The Federal Example, With Perverse Consequences.

The federal experiment inspired many states to enact their own forfeiture statutes. By 1984, thirty-six states had adopted various aspects of the federal Drug Enforcement Agency's model forfeiture law. DOJ National Strategy, *supra*, at 51.

Today, many states have forfeiture statutes that are just as broad in application as the federal counterpart, and many of the state statutes permit the enforcement agency to retain at least part of the assets seized through forfeiture proceedings. See, *e.g.*, Utah Code Ann. § 24-4-115(3); W. Va. Code § 60A-7-706; Mass. Gen. Laws ch. 94C, § 47(d); see also Dick M. Carpenter II et al., Institute for Justice, *Policing for Profit, The Abuse of Civil Asset Forfeiture* 14–16 & Appendix B (Nov. 2015) ("Policing for Profit") (surveying state laws), https://bit.ly/2CoVh7l; Bruce L. Benson & David W. Rasmussen, *Predatory Public Finance and the Origins of the War on Drugs 1984–1989*, 1 The Indep. Rev., no. 2, Fall 1996, at 163, 185 (noting that numerous states have "forfeiture laws" that cover the proceeds of "any criminal activity").

In states with these laws on the books, forfeiture proceedings are a way to fill budgetary needs, one that does not involve the typical democratic process with city councils, county commissions, or state legislatures, as the case may be. In the words of one city attorney, civil asset forfeiture is a pure "gold mine," or as one local police chief described it, "pennies

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Agencies, at 9–10 (July 2018), https://bit.ly/2o2NBOk ("The ***minimum*** federal share is 20 percent.").

from heaven." *Policing for Profit*, *supra*, at 15 (quoting former Las Cruces, N.M., city attorney Harry S. "Pete" Connelly, Jr. and Columbia, Mo., police chief Kenneth M. Burton). Indeed, many local authorities have come to rely on asset forfeiture to fund their local budgets. See, *e.g.*, John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. Crim. Just. 171, 171–87 (2001) (reporting results of survey of 1400 law enforcement agency chiefs, and noting that nearly 40% of responding agencies agreed that civil asset forfeiture was necessary as a budget supplement).

Dependency on civil asset forfeiture to fund the operations of law enforcement does not just create perverse incentives. It also undermines the rule of law, in the same way that over-reliance on court fees and fines places law enforcement and the judiciary in the role of bill collector, rather than arbiter of justice. See, *e.g.*, U.S. Department of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department* 9–15 (2015) (documenting the ways in which the law enforcement in the City of Ferguson prioritize generating revenue to meet budgetary needs), https://bit.ly/1lV31kb, Alicia Bannon et al., Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* 30–31 (2010) (noting ways in which reliance on court fees creates conflicts of interest in courts and probation departments), https://bit.ly/2M5KCOF. In short, a government institution charged with even-handedly applying the law acquires a vested interest on one side of the scale.

C. Forfeiture Laws Have Caused State Agencies To Pursue Assets Of Low-Income Individuals.

Proponents of asset forfeiture view (and viewed) the laws as essential to deter drug trafficking by making the assets of kingpins subject to forfeiture. See, *e.g.*, Stefan D. Casella, United States Attorneys' Bulletin, *Overview of Asset Forfeiture Law in the United States* 8 (Nov. 2007), https://bit.ly/2BFE1Fo; DOJ Review, *supra*, at 1. But this purpose has not panned out in practice.

1. Over time, in no small part due to the perverse budgetary incentives that forfeiture statutes create, law enforcement has shifted its focus from powerful kingpins and crime bosses to less-culpable actors. The Alabama Supreme Court has observed that "forfeiture laws are being used more frequently to punish users like [petitioner, a drug user,] rather than to punish those higher up the drug distribution chain." *Ex parte Kelley*, 766 So. 2d 837, 839 (Ala. 1999) (quoting lower court concurrence). In fact, most forfeitures today involve small dollar amounts — not large stashes of money seized from kingpins. See, *e.g.*, Radley Balko, *Chicago civil asset forfeiture hits poor people the hardest*, Washington Post (June 13, 2017) ("[R]oughly 11,000 seizures in Cook County over the five-year period were for amounts lower than $1,000. Nearly 1,500 were for amounts under $100."), https://wapo.st/2PFgyvz; Utah Commission on Criminal and Juvenile Justice, *2017 Utah Annual Forfeiture Report* 2 (listing median cash value of property seized in Utah in 2017 as under $1,100), https://bit.ly/2wNeYzL.

States' focus on seizing small sums of money from less-culpable individuals also results from the fact that forfeiture laws generally permit enforcement agencies to retain seized cash while requiring them to destroy seized drugs. This feature encourages agencies to target low-level operatives, and to seize cash after completion of a drug sale, rather than targeting drug traffickers or preventing drug sales. *Policing for Profit* at 16 (describing a multiyear investigation that revealed Tennessee police officers focused on westbound lanes where smugglers hauled cash back to Mexico, rather than eastbound lanes, where smugglers transport drugs to the east coast).

2. Worse, the incentive structure created by forfeiture statutes also means that state agencies are targeting individuals with little or no connection to criminal activity in order to fill their coffers rather than to recover the proceeds of crimes. Or, in the words of the Alabama Supreme Court, "state[s] [are] edging ever closer to abusing the forfeiture laws, confiscating individuals' property with no thought or proof of whether the items it is taking are actually the fruits of illegal drug sales or are actually being used to facilitate drug use or distribution." *Kelley*, 766 So. 2d at 839 (quoting lower court concurrence).

Take the example of Consuela, a low-income Philadelphia resident in her mid-sixties, whose niece rented a room in Consuela's home. Rebecca Vallas et al., Center for American Progress, *Forfeiting the American Dream: How Civil Asset Forfeiture Exacerbates Hardship for Low-income Communities and Communities of Color* 10 (April 2016) ("Forfeiting the American Dream"), https://ampr.gs/2OZeEFK. Local law enforcement searched Consuela's home while she was away, on suspicion that her niece's

boyfriend (who was arrested during the search) had been involved with drugs. *Id.* Once the boyfriend was released from jail, Consuela told him that he was not allowed in her home and she never had contact with him again. *Id.* Four months later, despite Consuela's lack of knowledge of or relationship to the boyfriend's drug crimes, the Philadelphia District Attorney initiated an action to seize and forfeit Consuela's home. *Id.* Unable to afford an attorney, but lucky enough to secure free legal help from a university clinic, Consuela challenged the forfeiture in court. *Id.* With legal assistance, Consuela was able to negotiate a settlement that let her keep her house in exchange for banning her niece and her boyfriend from the home forever. *Id.*

Of course, Consuela is not unique, but few of those who come to be in the cross-hairs of enforcement agencies are fortunate enough to secure able legal representation. Even law-enforcement agencies themselves have voiced concern about whether seizure and forfeiture activities actually further investigations, rather than target non-culpable individuals in the pursuit of items of value. See, *e.g.*, DOJ Review, *supra*, at 16, 20–30 (finding that the DOJ could but does not measure how its asset seizure and forfeiture activities advance criminal investigations, and reviewing a sample of seizures that "provided evidence that many of the DEA's interdiction seizures may not advance or relate to criminal investigations").

3. The enforcement trend of seizing the assets of those with little to no connection to criminal activity disproportionately affects low-income communities and communities of color. See, *e.g.*, *Forfeiting the American Dream*, *supra*, at 6. Often disconnected from

the financial mainstream and more likely to carry sums of cash, low-income individuals and people of color often have their assets seized during routine traffic stops. See *id.*; see also American Civil Liberties Union, *Civil Asset Forfeiture, Profiting from California's Most Vulnerable* 8 (2016), https://bit.ly/2PB1QWd. For example, the Los Angeles Sherriff's Department seized $10,000 a taco truck owner was carrying from his lawful taco business after a police dog smelled the money. *Profiting from California's Most Vulnerable*, *supra*, at 8. And police in San Diego, California, seized $18,000 from another individual who had been pulled over in a traffic stop, despite having paperwork demonstrating that the money was lawfully associated with her janitorial company. *Id.* at 7.

D. Forfeiture Statutes Afford Meager Procedural Protections.

Situations like these occur not just because of the incentive structures that forfeiture statutes create, but also because they afford meager protections to the property owner whose assets are seized. Those inadequate protections exacerbate the outsized impact that the forfeiture statutes have on "the poor and other groups least able to defend their interests in forfeiture proceedings." *Leonard* v. *Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., concurring in denial of writ of cert.).

1. To begin, in most states, enforcement agencies need not convict — or even charge — an individual with a crime before seizing the individual's assets. *Policing for Profit*, *supra*, at 17, 45–149; Southern Poverty Law Center, *Forfeiting Your Rights, How Alabama's Profit-Driven Civil Asset Forfeiture Scheme*

Undercuts Due Process and Property Rights 16–17 (2018), https://bit.ly/2PKbcz3; see, *e.g.*, Miss. Code Ann. § 41-29-179(2) (requiring no conviction before forfeiture); Mich. Comp. Laws § 333.7521(2) (same); Mass. Gen. Laws ch. 94C, § 47 (same); Iowa Code § 809A.13(7) (same). Contra, Minn. Stat. § 609.531, subd. 6a(b), (d) (requiring criminal conviction prior to forfeiture); Mont. Code Ann. § 44-12-207(1) (same).

2. And the government's standard of proof is more relaxed than in the criminal context. Many states only require the government to demonstrate its case by a preponderance of the evidence. See, *e.g.*, La. Stat. Ann. § 40:2612(G); Me. Stat. tit. 15, § 5822(3); Haw. Rev. Stat. § 712A-12(8); Ga. Code. Ann. § 9-16-17(a)(1); see also *Policing for Profit*, *supra*, Appendix B (collecting state statutes). Some state laws set the standard of proof even lower — at probable cause. *E.g.*, Mass. Gen. Laws ch. 94C, § 47(d); N.D. Cent. Code §§ 19-03.1-36.6, 19-03.1-36.2; R.I. Gen. Laws § 21-28-5.04.2(p); see also *Pope* v. *Gordon*, 369 S.C. 469, 474 (S.C. 2006) (government required to show probable cause).

Once the government meets the relaxed standard set by these statutes, it gets tougher still for the property owner. Many state laws require someone who wishes to recover his or her property to face the almost insurmountable hurdle of affirmatively proving a negative: that he or she had no relationship to the supposed criminal act giving rise to the forfeiture. *Policing for Profit*, *supra*, at 20 (in 2015, laws in 35 states placed the burden of proof on an innocent owner to demonstrate he or she had no relationship to the underlying crime); see, *e.g.*, N.D. Cent. Code §§ 19-03.1-36.6, 19-03.1-36.2 (once probable cause is proven, shifting the burden to the

claimant to prove by a preponderance of the evidence that the property is not subject to forfeiture).

3. The deck can be further stacked against the owners of property targeted in forfeiture proceedings. Some states allow the government to rely on hearsay evidence in the probable-cause phase, but require claimants to comply with the rules of evidence when rebutting the government's proof. 725 Ill. Comp. Stat. 150/9(B) (2018); see also *Commonwealth* v. *One 2004 Audi Sedan Auto.*, 456 Mass. 34, 38 (2010) (government need not rely on "admissible evidence" in showing probable cause to seek asset forfeiture); *State* v. *1981 Cadillac Deville*, 684 So. 2d 1123, 1124 (La. Ct. App. 1981) ("[P]robable cause may be established by . . . hearsay evidence.").

And few states offer counsel in forfeiture proceedings. *Forfeiting the American Dream*, *supra*, at 12; see also DOJ Review, *supra*, at 28 n.49 ("Both the House of Representatives and the Senate have expressed concern with the potential cost of legal representation when an individual contests a seizure. Recent legislative proposals have sought to guarantee legal counsel to those financially unable to obtain representation when contesting an administrative forfeiture."). That is the case even though forfeiture proceedings are widely recognized as punitive. *Austin* v. *U.S.*, 509 U.S. 602, 618–19 (1993) (noting "the historical understanding of forfeiture as punishment").

4. Finally, before a claimant can even get to court to challenge the forfeiture of an asset, some states require the payment of significant fees. See, *e.g.*, Haw. Rev. Stat. § 712A-10(9); R.I. Gen. Laws § 21-28-5.04.2(h)(4), (7); Tenn. Code Ann. § 40-33-206(b)(1);

2018 Ill. Legis. Serv. P.A. 100-699 (S.B. 564) (WEST). In Illinois, claimants are required to pay a bond for the greater of $100 or 10% of the property's value — an amount that is not completely recoverable even if the claimant wins. 2018 Ill. Legis. Serv. P.A. 100-699 (S.B. 564) (WEST) (requiring the return of only 90% of claimant's bond if "none of the seized property is forfeited"). If the claimant loses, he or she is further required to pay the cost of the forfeiture proceedings as well as the government's legal costs. *Id.* Such fees, when assessed on low-income individuals, can create an insurmountable cycle of debt. See *Criminal Justice Debt: A Barrier to Reentry*, *supra*, at 13–18.

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In short, even though forfeiture is viewed, appropriately, as a punitive measure, statutes authorizing forfeiture have imposed only limited procedural burdens upon state officers who wish to seize property. Moreover, these factors most sharply affect the ability of low-income Americans to challenge seizures. Similarly, language barriers, lack of formal education, lack of access to legal assistance, among other things, make it "less likely [for racial minorities] to successfully contest forfeiture after the property has been seized." Mary Murphy, *Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis*, 16 Tex. J. C.L. & C.R. 77, 93 (2010). And even where property owners have the ability to challenge a forfeiture, law enforcement's focus, described above, on forfeiting relatively small sums of cash means that the costs of mounting a challenge will often exceed the amount that has been seized. See Office of the Auditor, State of Hawai'i, *Audit of the Department of the Attorney General's Asset Forfeiture Program* 4 (June 2018) (about 85% of Hawai'i's administrative forfeiture

cases were uncontested between 2006 and 2015), https://bit.ly/2M5dMxb.

E. The Court Should Hold That The Excessive Fines Clause Is Incorporated Into The Fourteenth Amendment.

The breadth of the property rights that may be seized through forfeiture, the incentives for abuse that modern statutes create, and the few procedural protections they afford for individual property rights all suggest that the Court should hold that the Excessive Fines Clause, and its protections against excessive and unfair forfeitures, is incorporated.

1. The protections of the Excessive Fines Clause apply to federal forfeitures, and these protections curb disproportionate takings. See, *e.g.*, *von Hofe* v. *United States*, 492 F.3d 175, 186 (2d Cir. 2007) (finding forfeiture of wife's interest in home unconstitutional where record was devoid of any evidence linking wife to husband's marijuana-related crimes in the home); *United States* v. *$49,766.29 U.S. Currency*, 2003 WL 21383277, at *6 (W.D.N.Y. Jan. 22, 2003) (finding that "there are unresolved issues of material fact as to whether forfeiture of the entire $49,766 would be grossly disproportionate to Nelson's offense" and denying summary judgment on Excessive Fines Clause claim).

Similarly, some states — although not Indiana, among others, as this case shows — apply the Eighth Amendment's Excessive Fines Clause to state asset forfeitures, and in doing so they prohibit excessive government takings. See, *e.g.*, *In re Forfeiture of 1990 Chevrolet Blazer*, 684 So. 2d 197, 198 (Fla. Dist. Ct. App. 1996) (holding forfeiture of vehicle excessive under the Clause where the "value of the [automobile]

was double the amount of the fine that could be imposed for the [underlying drug offense to which owner] admitted"); *Kelley*, 766 So. 2d at 840 (finding forfeiture of car worth six times the maximum fine the legislature allowed to impose for the underlying drug crime "grossly disproportional to the gravity of [the] offense" and "bear[ing] no articulable correlation to any injury suffered by the state"); *State* v. *Boyd*, 618 N.W.2d 251, 252 (Wis. Ct. App. 2000) (affirming order holding that if the entire $28,000 value of Boyd's vehicle were forfeited, the forfeiture would violate the United States Constitution's prohibition of excessive fines).

2. The Court should hold that the Eighth Amendment's limitations curbing excessive federal forfeitures apply to the states as well. To begin, the Court has previously implied that all three clauses of the Eighth Amendment, including the Excessive Fines Clause, are incorporated. *Hall* v. *Florida*, 134 S. Ct. 1986, 1992 (2014) ("The Eighth Amendment provides that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' The Fourteenth Amendment applies those restrictions to the States."). This makes sense. All three clauses work harmoniously to "place[] limits on the steps a government may take against an individual, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments." *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989).

3. Beyond that, all relevant factors weigh in favor of incorporation. As Petitioner persuasively explains, the original understanding counsels in favor of

incorporation. So does the modern experience with civil asset forfeiture.

The Excessive Fines Clause mirrors a provision in the 1689 English Bill of Rights that prohibited the imposition of "excessive fines." *Browning-Ferris*, 492 U.S. at 267. The English provision addressed fines levied by the Stuart Kings and their judges against political rivals — fines so excessive that "opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed." *Id.* Our own founders "were aware of and took account of" those abuses, and designed the Excessive Fines Clause to "limit[] the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends." *Id.* The incentives that modern forfeiture statutes create and the lower procedural protections they provide both generate considerable potential for abuse of the same sort that led the Founders to adopt the Excessive Fines Clause in the first place.

As James Madison wrote in 1792, "Government is instituted to protect property of every sort. . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*." *Policing for Profit*, *supra*, at 44 & n.167. The Constitution contains numerous express protections for individual property rights. Consider the Due Process Clauses themselves; they expressly protect "property" from incursion by the federal government and the states without due process. Consider also the Contracts Clause, which originally applied to the states and was adopted for a "great and useful purpose" — to "maintain the integrity of contracts, and to secure their faithful execution throughout this Union" by prohibiting interference by

the state governments. *Bronson* v. *Kinzie*, 42 U.S. 311, 318 (1843). Consider, too, the Fifth Amendment's Takings Clause, designed to "prevent[] the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation,'" *Landgraf* v. *USI Film Prod.*, 511 U.S. 244, 266 (1994), and incorporated against the states not long after the adoption of the Fourteenth Amendment, see *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 241 (1897). All these limitations on government authority restrict state power to impinge upon property rights.

The Excessive Fines Clause is of a piece with these protections. The prohibition on excessive fines is "fundamental to our scheme of ordered liberty and system of justice," *McDonald*, 561 U.S. at 764 (emphasis omitted), for no government, state or federal, has a legitimate interest in imposing fines that are *excessive*.

Applying the Eighth Amendment's limitations to the states is the proper way to protect people from the improper seizures of property under the guise of law enforcement. As shown above, these seizures have only become more abusive in the wake of modern forfeiture statutes that have created distorted profit incentives for state officials and a stacked deck against property owners in court. And all that ostensibly in the name of pursuing kingpins in the "War on Drugs," but in reality profoundly affecting persons of modest means and people of color.

CONCLUSION

The Court should reverse the Indiana Supreme Court and hold that the Excessive Fines Clause is incorporated against the states.

Respectfully submitted,

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APPENDIX

Amici consist of the following organizations:

1. **The Drug Policy Alliance** ("DPA") is a non-profit organization seeking to advance policies and attitudes that best reduce the harms of both drug use and drug prohibition. DPA is composed of and supported by a broad coalition of individuals who share the belief that the war on drugs has failed. As part of its mission, DPA is interested in curtailing the practice of civil asset forfeiture, which (as detailed above) is a drug enforcement tool that is used disproportionately to harm the poor and minorities.

2. **The National Association for the Advancement of Colored People** ("NAACP"), founded in 1909, is the country's largest and oldest civil rights organization. The mission of the NAACP is to ensure the equality of political, social, and economic rights of all persons, and to eliminate racial hatred and racial discrimination. Throughout its history, the NAACP has used the legal process to champion equality and justice for all persons. Since its inception, the NAACP has advocated for fair criminal justice laws and procedures to protect communities of color and other vulnerable communities. In 2014, the NAACP published a report entitled Born Suspect, which provides important research and information regarding how the criminal justice system in our nation disproportionately harms African Americans and other communities of color. The NAACP advocates for fairness in policing procedures. The NAACP passed a resolution

calling for the termination of programs which condone and even reward civil asset forfeiture, including the so-called "Equitable Sharing Program" at the federal level which allows state and local law enforcement to seize property from individuals without proving criminal wrongdoing and then refer this property to federal authorities to pursue forfeiture.

3. **Americans for Prosperity** exists to recruit, educate, and mobilize citizens in support of the policies and goals of a free society at the local, state, and federal level, helping every American live their dream — especially the least fortunate.

4. **The Brennan Center for Justice at NYU School of Law** ("the Brennan Center") is a non-profit, nonpartisan public policy and law institute that seeks to secure our nation's promise of "equal justice for all" by creating a rational, effective, and fair criminal justice system.[3] The Brennan Center advocates for reshaping public policies that undermine this vision, including the imposition of criminal justice debt and related practices.

5. **FreedomWorks Foundation** trains and educates activists on the principles of smaller government, lower taxes, free markets, personal liberty and the rule of law.

6. **The Law Enforcement Action Partnership** is a 501(c)(3) nonprofit of police, judges, prosecutors, corrections officials, and other law enforcement professionals who seek to make

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[3] This brief does not purport to represent the views, if any, that the N.Y.U. School of Law may have.

communities safer by focusing law enforcement resources on the greatest threats to public safety, promoting alternatives to arrest and incarceration, addressing the root causes of crime, and working toward healing police-community relations.

7. **The Independence Institute** is a non-profit Colorado public policy research organization founded in 1985 on the eternal truths of the Declaration of Independence. The Institute is the second-oldest state think tank. The Institute has written and testified extensively on forfeiture abuse and forfeiture reform at the state, local, and congressional levels. The Institute has participated in many constitutional cases, and its amicus briefs in *District of Columbia* v. *Heller* and *McDonald* v. *Chicago* were cited in the opinions of Justices Alito, Breyer, and Stevens (under the name of lead amicus ILEETA, International Law Enforcement Educators and Trainers Association). The research of the Institute's Senior Fellow in Constitutional Jurisprudence, Robert G. Natelson, was cited by Justice Thomas in *Adoptive Couple* v. *Baby Girl* (concurring), and *Upstate Citizens for Equality* v. *United States* (dissenting from denial of certiorari); Justices Scalia, Thomas, and Alito, and Chief Justice Roberts in *N.L.R.B.* v. *Noel Canning* (concurring) and *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n* (dissenting); Justices Alito and Scalia in *Town of Greece* v. *Galloway* (concurring); Justice Kennedy in *Arizona* v. *Tribal Council of Arizona* (concurring in part

and dissenting in part); and by then-Judge Gorsuch in *Kerr* v. *Hickenlooper* (dissenting).

8. **Libertas Institute** is a free market think tank that collaborates with a diverse group of organizations and allies to create a freer Utah, effecting change through legal research, public advocacy and advertising, lawsuits against government, events, publications, and more.

9. **The Drug Policy Forum of Hawai'i** ("DPFHI") is a non-profit organization founded in 1993 to educate policymakers and the public about effective ways of addressing drug issues in Hawai'i with sensible and humane policies that reduce harm, expand treatment options, and adopt evidence-based practices while optimizing the use of scarce resources. The Drug Policy Forum of Hawai'i envisions a just society where drug laws are grounded in science, compassion, and public health, and where criminalization is reserved for those who pose a genuine danger to public safety. DPFHI believes that civil asset forfeiture is a blunt law enforcement tool, whose modern origins are rooted in the misguided "War on Drugs," which spread to the states, including Hawai'i, and has resulted in the targeting of the poor and communities of color while undermining fundamental notions of due process.

10. **The Colorado Criminal Defense Bar** ("CCDB") is an organization of approximately 1,000 attorneys and it is one of the largest bar associations in Colorado. The CCDB is dedicated to protecting the rights of the accused. We provide training and support to the criminal defense community in an effort to

promote zealous advocacy for our clients at every stage of representation.

11. **Alabama Appleseed Center for Law and Justice** ("Alabama Appleseed") is a non-profit, non-partisan 501(c)(3) organization founded in 1999 whose mission is to work to achieve justice and equity for all Alabamians. Alabama Appleseed is a member of the national Appleseed Network, which includes 18 Appleseed Centers across the U.S. and in Mexico City. As part of its Fair Schools, Safe Communities Campaign, Alabama Appleseed has documented how civil asset forfeiture has evolved from a program intended to strip illicit profits from drug kingpins into a revenue-generating scheme for law enforcement that is widely used against people — disproportionately African American — accused of low-level crimes or no crime at all. Alabama Appleseed is working to stop this harmful practice.

12. **The Rio Grande Foundation** ("RGF") is a research institute dedicated to increasing liberty and prosperity for all of New Mexico's citizens. RGF works to inform New Mexicans of the importance of individual freedom, limited government, and economic opportunity. At the very core of individual freedom is individual ownership of property. As such, reform and even repeal of civil asset forfeiture laws nationally and at the state level have been a core interest of our organization. The RGF was part of a bipartisan coalition that successfully advocated for repeal of civil asset forfeiture in New Mexico. Wherever possible the RGF

continues to advocate for similar reforms to be enacted in other states and at the federal level.